United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1384

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-v-

REV. ALBERTO MEJIAS, MANUEL FRANCISCO PADILLA MARTINEZ, HENRY CIFUENTES-ROJAS, JOSE RAMIREZ-RIVERA, ESTELLA NAVAS, MARIO NAVAS and FRANCISCO CADENA,

Appellants.

----------x

B
P/S

REPLY BRIEF

Appeal from a Judgment of Conviction
In the United States District Court
For the Southern District of New York

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Appellants.

Dkt. No. 76-1384

REPLY BRIEF ON BEHALF OF
DEFENDANT HENRY CIFUENTES-ROJAS

Preliminary Statement

This brief is submitted on behalf of defendant, Henry Cifuentes-Rojas, in reply to specific arguments raised in the Government's brief. Failure to reply to any particular matter in the Government's brief means that Rojas' main brief sufficiently addressed the question or that the particular matter is insignificant with respect to the disposition of this case.

A supplemental appendix has been prepared for the convenience of the Court and accompanies this reply brief, containing the specific motion to suppress and affidavits that were timely served in the Court below.

A. INTRODUCTION

The Government's brief chose not to contest the substantive merits of the legality of the search of Apartment 6A at 327 West 30th Street, New York, N.Y. as stressed in Point Two of defendant Rojas' main brief. Rather, the Government concedes that if their contentions based on (1) the concurrent sentence doctrine, (2) the timeliness of Rojas' motion to suppress, and (3) the factual sufficiency of Rojas' motion to suppress, fail to persuade this Honorable Court, then Rojas would be entitled to "a hearing before Judge Carter to establish the facts surrounding the search..." (Government brief at p.70).

POINT TWO of defendant Rojas' main brief clearly outlines the illegality of the search in the instant case. It is respectfully submitted that this Honorable Court should determine the issue of the legality of the search, and/or order a hearing before Judge Carter on the issues of the illegal search, as the Governments brief suggests.

B. DEFENDANT ROJAS HAD STANDING TO TEST THE VALIDITY OF THE SEARCH OF APARTMENT 6A, 327 WEST 30TH STREET, NEW YORK, N.Y.

Overt Act 75 of Count One of the instant indictment charged Rojas with possession of cocaine in Apartment 6A, 327 West 30th Street, Manhattan, New York.

Count Five of said Indictment charges Rojas with possession with intent to distribute the same cocaine alleged in Overt Act 75 of Count One.*

The indictment alleged that Rojas was also known as Botellon. In his summation, Assistant U.S. Attorney Carey agreed and thereby admitted that Rojas a/k/a Botellon owned, resided, and/or controlled Apartment 6A, 327 West 30th Street.

For example:

> Count Five in the indictment charges Botellon with possession of cocaine that was found in Apartment 6A, 327 West 30th Street. The documents which were seized from that apartment established beyond a doubt that he is the man who was the resident of that particular apartment. (Trial Transcript, pgs. 3749-3750)

AGAIN:

> You may remember Mr. Shaw referring to his client as Juan Jose Plata while talking about

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* The Government's contention that the "concurrent sentence" doctrine prevents this Court from considering Rojas' argument is without merit. The claim of error raised by Rojas is applicable to both Count Five and Overt Act Number 75 of Count One. Furthermore, the "concurrent sentence "doctrine itself is of dubious validity. BENTON v. MARYLAND, 395 U.S. 784 (1969), UNITED STATES v. CIOFFI, 487 F2d 492, 498 (2nd Cir., 1973), UNITED STATES v. FEBRE, 425 F2d 107, 113-114 (2nd Cir., 1970)

his client before you. In that apartment then is the evidence without a doubt that that was Mr. Botellon's apartment: (Trial Transcript, pg. 3752)

AGAIN:

In short, the evidence is just overwhelming whichever way you look. It's there. It connects this individual Botellon with Apt. 6A, 327 West 30th Street. He's connected to that apartment. (Trial transcript, pg. 3752)

AND AGAIN:

Botellon has control of that apartment. He was seen exiting that apartment. He's referred to in many, many conversations as living in Apt. 6A, expressly in one of the conversations with Hugo Ramirez who had in his possession a card including the telephone number of Apt. 6A, the West 30th Street apartment. (Trial Transcript, pg. 3752)

AND AGAIN:

The government has not tried to prove that he had in his possession physical possession, in his hands, the cocaine at the time of his arrest. What he did have was control over that cocaine. He had control because it was his apartment. (Trial Transcript, pg. 3753)

Based on all of the above factors, defendant Rojas had "automatic" standing.

> In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a "person aggrieved by an unlawful search and seizure" upon a motion to suppress evidence prior to trial. JONES v. UNITED STATES, 362 U.S. 257, 264 (1960)

The government's reliance on United States v. Tortorello, 533 F2d 809 (2nd Cir., 1976); cert. den, 45 U.S.L.W. 3300 (10/19/76), is totally misplaced because that case involved a consent search. The government's reliance on Brown v. United States, 411 U.S. 223 (1973) is inappropriate because the petitioner's in that case admittedly had no possessory interest in the premises where the stolen goods were stored.

In the case at bar, defendant Rojas was charged with possessory crimes in an apartment that the Government argued and proved to the jury's satisfaction belonged to him, and where personal belongings of the defendant were seized.

> The presecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing hime the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. The possession on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational

conception of the requirements of Rule 41 (e).

The Government's argument to the contrary essentially invokes elegantia juris. In the interest of normal procedural orderliness, a motion to suppress, under Rule 41(e), must be made prior to trial, if the defendant then has knowledge of the grounds on which to base the motion. The Government argues that the defendant therefore must establish his standing to supress the evidence at that time through affirmative allegations and may not wait to rest standing upon the Government's case at the trial. This provision of Rule 41 (e), requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt. See Nardone v United States, 308 US 338, 341, 342,84 L ed 307, 311, 312, 60 S Ct 266: Segurola v United States, 275 US 106, 111, 112, 72 L ed 186, 189, 48 S Ct 77; Agnello v United States, 269 US 20, 34, 70 L ed 145, 149, 46 S Ct 4, 51 ALR 409; Adams v New York, 192 US 585, 48 L ed 575, 24 S Ct 372. As codified, the rule is not a rigid one, for under Rule 41 (e) "the court in its discretion may entertain the motion (to suppress) at the trial or hearing." This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement. This underlying policy likewise precludes application of the Rule so as to compel the injustice of an internally inconsistent conviction. In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a "person aggrieved by an unlawful search and seizure" upon a motion to suppress evidence prior to trial. Rule 41 (e) should not be applied to allow the Government to deprive the defendant of standing to bring a motion to suppress

by framing the indictment in general terms, while prosecuting for possession.

JONES V. UNITED STATES
362 U.S. 257,263-265 (1960)

C. DEFENDANT ROJAS' MOTION TO SUPPRESS WAS TIMELY

The Government has admitted that Rojas filed his motion to suppress with requests for discovery and bill of particulars on April 1, 1976, the deadline set by Judge Carter. Said motion to suppress was improperly denied on April 8, 1976. (See supplemental appendix, pages B1-B14.)

Rojas renewed the motion on May 14. 1976 and May 18, 1976, a supplemental brief in support of said motions to suppress was filed on May 19, 1976 (see docket entries, joint appendix of main brief, vol I, A12, A13) (see supplemental appendix, pages B17-B50).

Said renewal of the motion to suppress was made after finally receiving the government's reply to the original motion to suppress and for a bill of particulars on May 11, 1976 and obtaining a statement from A.U.S.A. Michael Carey that there was still time to file motions. (See supplemental appendix, Stuart R. Shaw's affidavit dated 5/18/76 - pages B19-B20). It should be noted that the original trial motion of Rojas stated that "Upon particularization by the Government, pursuant to defendant's motion for discovery and inspection, this motion will be further specified and enumciated".

(Supplemental appendix pages B7.) See affidavit Stuart R. Shaw, dated 4/1/76 page 5).

Further, Rojas relied on People v Salazar 83MISC2d 922, 373NYS2d 295 (1975) an opinion written on the exact issue in the State Court by Justice Liston Coon, which clearly cited Federal and State authority for the proposition that the contraband in question had to be suppressed because of an illegal search and seizure. (See supplemental appendix, Motion of E. Chase, Esq. 4/2/76, pages B15-B16).

The Government contends that Judge Carter denied Reojas' motion for failure to file a memorandum of law on April 1. The record does not support this contention. The first brief submitted on the instant appeal by Rojas' fully sets forth the colloquy between Judge Carter and the attorney for Rojas. The record at the suppression hearing reveals that Rojas' motion was denied on the grounds of timeliness and/or standing.

The docket entries reveal that none of the defendants filed memoranda of law on or before April 1, 1976. The docket entries reveal that Rojas' motion to suppress was the only such motion to meet the April 1st "deadline". The attorney for defendant Padilla Martinez filed his motion to suppress with a memorandum of law on April 2, 1976. Defendant Padilla Martinez, however, was

granted a pre-trial suppression hearing in spite of these so-called "deficiencies" in the moving papers. The Government admits that Judge Carter accepted even post-suppression hearing memoranda. (See Government brief footnote, page 54 & 55), (see supplemental appendix, pages B28-B50).

The Trial Court held a pre-trial conference on March 30, 1976. The Trial Court ruled that any and all motions, briefs, etc. made on behalf of an individual defendant would innure to the benefit of co-defendants.

The aforementioned motion to suppress, accompanied by a memorandum of law, filed on behalf of defendant, Padilla Martinez was specifically joined in by defendant Rojas. (See supplemental appendix, page B15).

SUB-POINT C of the memorandum of law attached to the motion filed on behalf of defendant Padilla Martinez, and joined in by defendant Rojas concerns the suppression of all evidence seized on September 3, 1974 and relies on the New York State Court opinion of Justice Coon in People v Salazar, 83 M 2d 922, 373 NYS 2d 295 (N.Y.Co., 1975) (See supplemental appendix, page B16).

Certainly, the Trial Court and the Government were on notice from the filing of said motions of defendant Rojas' standing and legal position through the well-reasoned opinion of Justice Coon, ordering suppression. It should be further noted that Rojas supplied the Trial Court with a copy of Justice Coon's entire opinion, thereby placing

the Court and the Government on notice as to the basis of his contentions. (See supplemental appendix, pages B39-B50).

The Government further contends that granting a hearing to defendant Rojas would have created "pressures, possibly in further derogation of the rights of Rojas' co-defendants to a speedy trial". It is submitted that this argument to totally misplaced, and has no effect on the issue of timeliness of the motion. A hearing on the issues raised by Rojas' suppression motion could have efficiently and economically been heard along with the issues raised by the co-defendants who were granted a hearing and/or Rojas' motion for a severe.. should have been granted if the prosecutor is to be be ..eved in its argument. Rojas' attorney was prepared to conduct a suppression hearing at any time.

The prosecutions argument is contrary to fact. Judge Carter's schedule was so over burdened because of the heavy case load he is forced to carry in the Southern District that he did not have any free time to hear motions (but for a hearing on Valenzuela's freedom before trial that Rojas' counsel was present at) until 5/19/76 the date of the hearing on the motion to suppress where Judge Carter only heard Mejia, Padilla, Valenzuela and Salanzer; and refused to hear Rojas.

The Government's brief clearly describes how the co-defendants were granted hearings on motions to suppress in spite of the fact that their motions did not technically meet the "time limits" established by the trial court. It is respectfully submitted that Rojas was subjected to a fundamentally unfair double standard when he was denied a hearing on the issues of suppression when other defendants were granted their hearing.

Should this Court find there was a delay in filing motions, Counsel for Rojas notes that he could not locate the State Court File(s) of his client and/or the three attorney's who represented his client there. Rojas had had no less then three different attorneys representing him in New York State Supreme Court. At least two of the said attorneys were assigned counsel and one no longer maintained a private practice in 1976, Mr. Randall, now of the N.Y. Board of Education. Another attorney was perhaps attempting to be retained (Stanley Zinner) and did not turn over his file to Rojas Federal counsel until amost immediately before trial, despite repeated phone calls and correspondence by mail requesting same. A third attorney was located just prior to trial. Mr. Rojas incarcerated in the M.C.C. and many hours were spent by counsel attempting to visit Rojas to no avail. Rojas speaks only Spanish and

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an interpreter had to be obtained and acquaint counsel on his visits to M.C.C. (See Supp. App. B-51, B-52)

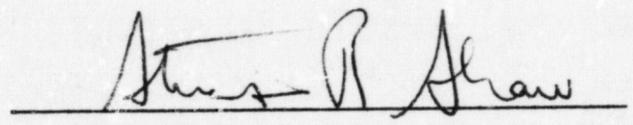
Rojas argues that the above, if there was delay, it was excusable delay, JONES V. UNITED STATES Supra.

CONCLUSION

FOR ALL THE AFOREMENTIONED REASONS, THE JUDGEMENT OF CONVICTION AGAINST DEFENDANT ROJAS SHOULD BE REVERSED, OR IN THE ALTERNATIVE, THERE SHOULD BE A REMAND FOR A HEARING TO SUPPRESS EVIDENCE SEIZED AT APARTMENT 6A, 327 WEST 30TH STREET ON SEPTEMBER 3, 1974.

Dated: New York, New York
January 17, 1977

Respectfully submitted,



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